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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,
10 Plaintiff,
11 v.
12 Jeffery Jessup,
13 Defendant.
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No. CR-23-00223-001-PHX-DWL
ORDER

15 Pending before the Court is a motion to dismiss the indictment filed by Defendant
16 Jeffrey Jessup (“Defendant”). (Doc. 40.) The motion is fully briefed (Docs. 45, 48) and
17 the Court concludes that oral argument is unnecessary. *See* LRCiv 7.2(f); LRCrim 12.1(a),
18 47.1. For the reasons that follow, the motion is denied.

19 **RELEVANT BACKGROUND**

20 On February 9, 2023, Defendant charged via complaint with the crime of being a
21 felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (Doc. 1.) As
22 relevant here, the complaint alleges that Defendant was arrested on February 8, 2023 on
23 suspicion that he had just committed a carjacking; that, during the arrest sequence, law
24 enforcement officials found one firearm tucked into Defendant’s waistband; that law
25 enforcement officials also found three additional firearms inside a bag that Defendant had
26 been seen carrying before his arrest; and that Defendant admitted during a post-arrest
27 interview “to possessing all four firearms. He claimed he purchased the firearms a week
28 prior from an unknown ‘junkie.’ He had purchased the firearms for some cash and pills.”

(*Id.* ¶¶ 8-10, 24-28.) The complaint also alleges that Defendant has three prior felony convictions: (1) a 2020 conviction in Arizona state court for the crime of Misconduct Involving Weapons, which resulted in a 2.5-year sentence; (2) a 2016 conviction in Georgia state court for the crime of Possession of Cocaine, which resulted in a sentence of three years’ probation with an initial three months in confinement; and (3) a 2016 conviction in Georgia state court for the crime of Burglary in the First Degree, which resulted in a sentence of three years’ probation with an initial three months in confinement. (*Id.* ¶ 33.)

On February 21, 2023, the grand jury returned an indictment charging Defendant with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (Doc. 9.)

On June 19, 2024, Defendant filed the pending motion to dismiss. (Doc. 40.)

On July 17, 2024, the government filed a response. (Doc. 45.)

On August 2, 2024, Defendant filed a reply. (Doc. 48.)

DISCUSSION

I. The Parties’ Arguments

Defendant moves to dismiss the indictment on the ground that “the sole count . . . violates the Second Amendment of the United States Constitution.” (Doc. 40 at 1.) The primary authority on which Defendant relies is *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024), which was issued on May 9, 2024. Defendant contends that, under *Duarte*, § 922(g)(1) is presumptively unconstitutional and thus “it is incumbent upon the government to rebut the ‘strong presumption’ that the text of the Second Amendment confers to the defendant the right to bear arms by demonstrating that § 922(g)(1)’s lifelong, no-exception, categorical ban is consistent with this Nation’s historical tradition of firearm regulation.” (Doc. 40 at 4.) Defendant concludes: “Because the government here cannot, this court must find that under the present circumstances, [§] 922(g)(1) violates Mr. Jessup’s Second Amendment right, is unconstitutional, and order the dismissal of the Indictment.” (*Id.* at 5, emphasis omitted.)

1 In response, the government notes that *Duarte* is no longer good law because “[o]n
 2 July 17, 2024, the Ninth Circuit granted the United States’ petition for rehearing en banc,
 3 and therefore vacated the three-judge opinion [on] which Defendant’s motion is based.”
 4 (Doc. 45 at 1.) The government further argues that “[s]ection 922(g)(1) remains
 5 constitutional in all of its applications. The government maintains that the Supreme
 6 Court’s decision in *New York Pistol & Rifle Ass’n v. Bruen*, 597 U.S. 1 (2022), did not
 7 abrogate or implicitly overrule the Ninth Circuit’s decision in *United States v. Vongxay*,
 8 595 F.3d 1111 (9th Cir. 2010), upholding § 922(g)(1), or otherwise call into question the
 9 statute’s validity. *Vongxay* is not clearly irreconcilable with *Bruen*.” (*Id.* at 3.)
 10 Alternatively, the government argues that “[e]ven under *Duarte*, § 922(g)(1) is
 11 constitutional as applied” because “the *Duarte* panel did not hold § 922(g)(1) to be facially
 12 unconstitutional as to every felon” and included a “parenthetical” noting that § 922(g)(1)
 13 could be constitutionally applied to a defendant, like Defendant, with a prior burglary
 14 conviction. (*Id.* at 4-5.)

15 In reply, Defendant accuses the government of inconsistency for contending that the
 16 three-judge panel’s decision in *Duarte* is no longer citable in light of the grant of rehearing
 17 *en banc* but then citing portions of *Duarte* in an attempt to show that § 922(g)(1) may be
 18 constitutionally applied to a defendant with a prior burglary conviction. (Doc. 48 at 1-2.)
 19 Next, Defendant “maintains that *Vongxay*’s reasoning is irreconcilable with *Bruen*.” (*Id.*
 20 at 2.) Finally, Defendant disputes that, under *Duarte*, “anyone with a previous felony
 21 burglary conviction is categorically subject to the charge of Felon in Possession of a
 22 Firearm in violation of 18 U.S.C. §§ 922(g)(1).” (*Id.* at 3.) According to Defendant, “[t]he
 23 quotation contained in the . . . parenthetical pertained to the Ninth Circuit’s previous
 24 analogous finding on an unrelated issue, enhancing sentences, not an analysis or
 25 comparison of burglary to a Founding-era felony.” (*Id.* at 4, emphasis omitted.)

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1 II. Analysis

2 The Court agrees with the government that, under Ninth Circuit law as it stands
 3 today, the Second Amendment does not preclude the application of 18 U.S.C § 922(g)(1)
 4 to any defendant with a prior felony conviction, regardless of the nature of that conviction.
 5 In its 2010 decision in *Vongxay*, the Ninth Circuit squarely held that “§ 922(g)(1) does not
 6 violate the Second Amendment as it applies to . . . a convicted felon.” *Vongxay*, 594 F.3d
 7 at 1118. Other three-judge panels of the Ninth Circuit have subsequently reaffirmed the
 8 validity of this holding, albeit while questioning whether *Vongxay* was correctly decided.
 9 *United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016) (“[W]e held in [*Vongxay*]
 10 that ‘felons are categorically different from the individuals who have a fundamental right
 11 to bear arms,’ and we accordingly upheld 18 U.S.C. § 922(g)(1) against a Second
 12 Amendment challenge. Our decision in *Vongxay* forecloses Phillips’s argument, and we
 13 accordingly affirm the district court’s denial of Phillips’s motion to dismiss the indictment.
 14 Nevertheless, there are good reasons to be skeptical of the constitutional correctness of
 15 categorical, lifetime bans on firearm possession by all ‘felons.’”) (citations and emphasis
 16 omitted). Although the *en banc* panel in *Duarte* may, in the coming months, decide to
 17 reconsider *Vongxay*, this Court is duty-bound to follow *Vongxay* unless and until it is
 18 overruled. *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981) (“District courts
 19 are bound by the law of their own circuit.”).

20 The only exception would be if a post-*Vongxay* decision by the Ninth Circuit or
 21 Supreme Court “undercut the theory or reasoning underlying [*Vongxay*] in such a way that
 22 the cases are clearly irreconcilable.” *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir.
 23 2003) (en banc). Although Defendant contends that *Bruen* is such a decision (and the now-
 24 vacated three-judge panel decision in *Duarte* agreed), it is notable that *Bruen* did not
 25 purport to overrule the Supreme Court’s earlier statement that “longstanding prohibitions
 26 on the possession of firearms by felons” are “presumptively lawful.” *District of Columbia*
 27 *v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008). To the contrary, the *Bruen* majority stated
 28 that its new test was “[i]n keeping with *Heller*.” *Bruen*, 597 U.S. at 17. Additionally, six

1 Justices in *Bruen*—including three members of the majority—stated in separate writings
 2 that *Heller*’s statements about longstanding gun prohibitions remain valid. *Id.* at 72 (“Nor
 3 have we disturbed anything that we said in *Heller* . . . about restrictions that may be
 4 imposed on the possession or carrying of guns.”) (Alito, J., concurring); *id.* at 80-81 (“As
 5 Justice Scalia wrote in his opinion for the Court in *Heller*, . . . ‘[n]othing in our opinion
 6 should be taken to cast doubt on longstanding prohibitions on the possession of firearms
 7 by felons’”) (Kavanaugh, J., joined by Roberts, C.J., concurring); *id.* at 129 (“Like
 8 Justice KAVANAUGH, I understand the Court’s opinion today to cast no doubt on that
 9 aspect of *Heller*’s holding.”) (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting).
 10 Given this backdrop, it is difficult to see how *Bruen* could be construed as satisfying
 11 *Miller*’s exacting standard for finding that a Ninth Circuit decision has been implicitly
 12 overruled.

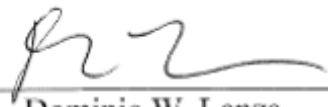
13 Furthermore, the Court does not write on a blank slate when evaluating whether
 14 *Bruen* implicitly overruled *Vongxay*. Earlier this year, the Ninth Circuit issued a published
 15 opinion concluding that *Bruen* does not preclude the pretrial disarmament of a defendant
 16 who has simply been charged with a serious felony. *United States v. Perez-Garcia*,
 17 96 F.4th 1166 (9th Cir. 2024). In reaching that conclusion, the *Perez-Garcia* panel
 18 emphasized that “the Supreme Court has maintained that the Second Amendment
 19 ‘presumptively’ allows Congress to disarm persons convicted of felony offenses.” *Id.* at
 20 1186 (citing *Heller*, 554 U.S. at 626 & n.26). Because *Vongxay* relied on this same portion
 21 of *Heller*, the Court construes this passage as a strong indication that, even post-*Bruen*, the
 22 Ninth Circuit considers *Vongxay* good law. In a related vein, the Ninth Circuit issued an
 23 unpublished decision earlier this year in which it expressly rejected the argument that
 24 *Bruen* implicitly overruled *Heller*. *United States v. Whitney*, 2024 WL 1429461, *2 (9th
 25 Cir. 2024) (“The felon-in-possession statute, 18 U.S.C. § 922(g)(1), is facially
 26 constitutional. Nothing in the Supreme Court’s decision in [*Bruen*] reflects a retreat from
 27 the Court’s earlier statement in [*Heller*] that longstanding prohibitions on the possession
 28 of firearms by felons and the mentally ill are presumptively lawful.”) (cleaned up). Thus,

1 although perhaps the *en banc* panel in *Duarte* will chart a new course in the coming months,
2 “Defendant’s argument is foreclosed by [current Ninth Circuit] precedent. The Ninth
3 Circuit’s cases make clear that § 922(g)(1) can be constitutionally applied to *any*
4 felon” *United States v. Coleman*, 2024 WL 3890710, *2 (D. Ariz. 2024).¹

5 Accordingly,

6 **IT IS ORDERED** that Defendant’s motion to dismiss the indictment (Doc. 40) is
7 **denied.**

8 Dated this 6th day of September, 2024.

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13 Dominic W. Lanza
14 United States District Judge
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28 ¹ Given these conclusions, it is unnecessary to resolve the government’s alternative
argument that the particular nature of one of Defendant’s prior felony convictions (*i.e.*, his
2016 burglary conviction) forecloses his Second Amendment challenge.